(5) On the expiry of the agreement, the said agreement dated May 2, 1979, was entered into for a period of six years from April 1, 1979, to March 31, 1985, for the sum of $800 p.m.

(6) The defendant refused to affirm the statutory declaration on the second agreement.

(7) The defendant carried on his tailoring business on the ground floor of the said premises and resided with his family on the first floor of the said premises.

(8) The defendant had possession and full control of the said premises without interference from the plaintiff.

The trial judge in his Grounds of Judgment discussed the law on the matter and applied the law to the undisputed facts and the operative clauses in the said agreement and came to the conclusion that the said agreement was a tenancy agreement. In my view the trial judge has applied the correct law and has come to the right conclusion that it was a tenancy agreement and that the plaintiff had used the device of a licence agreement to put the label of a licence on it.

Sommerville L.J. in *Facchini* v. *Bryson*,[2] said (page 1389):

"If, looking at the operative clauses in the agreement, one comes to the conclusion that the rights of the occupier, to use a neutral word, are those of a lessee, the parties cannot turn it into a licence by saying at the end "this is deemed to be a licence"; nor can they, if the operative paragraphs show that it is merely a licence, say that it should be deemed to be a lease."

Lord Justice Denning (at page 1390) in the same case made this observation:–

"Their relationship is determined by the law and not by the label which they choose to put on it; *Commissioners of Customs & Excise* v. *Pools Finance* (1952) T.L.R. 797). It is not necessary to go so far as to find the document a sham. It is simply a matter of finding the true relationship of the parties. It is most important that we should adhere to this principle, or else we might find all landlords granting licences and not tenancies, and we should make a hole in the Rent Acts through which could be driven-I will not in these days say a coach and four-but an articulated vehicle."

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *J.B. Jeyaretnam; Wee Swee Teow & Co.*

MALAYSIAN REPORTS

JAYASANKARAN v. PUBLIC PROSECUTOR

[F.C. (Raja Azlan Shah L.P., Salleh Abas F.J. & Abdoolcader J.) December 6, 1982]
[Kuala Lumpur – Federal Court Criminal Reference No. 6 of 1982)]

Criminal Law and Procedure – Appeal – Whether petition of appeal signed by solicitor acting on authority of appellant meets requirements of law – Criminal Procedure Code (F.M.S. Cap. 6), s. 307(iv).

In this case the appellant had been convicted for an offence under section 465 of the Penal Code and bound over for 1½ years. He appealed against the conviction. Both the appellant and his solicitor signed the notice of appeal but only the solicitor signed the petition of appeal. The learned Judge held that the appellant must himself sign the petition of appeal and he struck out the appeal on the ground of non-compliance with section 307(iv) of the Criminal Procedure Code. The appellant then applied for the following question to be referred to the Federal Court "Whether a petition of appeal signed by only the solicitor for the appellant acting on the authority of the appellant meets the requirements of section 307(iv) of the Criminal Procedure Code".

Held, the answer to the question must be in the affirmative. Section 307(i) of the Criminal Procedure Code which relates to the procedure for appeal provides for a dissatisfied party to prefer an appeal to the High Court by lodging a notice of appeal and subsection (iv) stipulates the time for the appellant to lodge with the subordinate court a petition of appeal. Neither provision signifies the signatory to the notice or the petition and neither provides for the appellant to do so "personally" or in person as some legislative enactments specifically prescribe. This therefore attracts the maxim *"qui facit per alium facit per se"* (he who does an act through another is deemed in law to do it himself).

Cases referred to:

(1) *Pitting bin Haji Mohd. Ali* v. *Public Prosecutor* [1979] 2 M.L.J. 136.
(2) *Toh Yew Sing & Ors.* v. *Public Prosecutor* [1980] 2 M.L.J. 215.

FEDERAL COURT.

R.R. Chelliah for the appellant.
Mokhtar bin Abdullah Deputy Public Prosecutor for the respondent.

Cuv. Adv. Vult.

Raja Azlan Shah L.P. (delivering the Judgment of the Court): The question for reference under section 66(1) of the Courts of Judicature Act 1964 is:

"Whether a petition of appeal signed by only the solicitor for the appellant acting on the authority of the appellant meets the requirements of section 307(iv) of the Criminal Procedure Code."

While the reference is of course of great importance to the appellant, and no doubt to others similarly placed, the question whether the appellant was in breach of section 307(iv) of the Criminal Procedure Code by not signing himself the petition of appeal raises a question of law of public importance, and it was for that reason that leave was given to refer the question to us under section 66(1) of the Courts of Judicature Act 1964 so that that question might be fully argued and determined, especially in the light of a number of recent decisions of the High Court on this issue the correctness of which have been challenged.

The facts can be shortly stated. The appellant was charged and convicted of an offence under section 465 of the Penal Code and was bound over for 1½ years under section 294 of the Criminal Procedure Code ('The Code'). He appealed against conviction. Both he and his solicitor signed the notice of appeal but only the solicitor signed the petition of appeal. The learned judge held, on a preliminary point, that the appellant himself must sign the petition of appeal. He struck out the appeal on the ground of non-compliance with subsection (iv) of section 307 of the Code.

The learned judge seems to think that the words "any person who is dissatisfied with any judgment" in subsection (i) of section 307 of the Code when read in conjunction with the words "the appellant" in subsection (iv) of the section can only refer to the accused person. He therefore concluded that it is the accused person and not the solicitor who must sign the petition of appeal. Subsection (iv) of section 307 of the Code reads as follows:

"Within ten days after the copy of the grounds of decision has been served as in the last preceding subsection provided, the appellant shall lodge with the clerk of the Magistrate's Court at which the trial was held a petition of appeal in triplicate addressed to the High Court."

The learned judge relied on Practice Note No.2 of 1960 which was issued some two decades previously by the Chief Registrar on the direction of the Chief Justice to the effect that a notice of appeal and petition of appeal must be signed by the appellant himself, and where counsel is retained, both the appellant and counsel must sign the documents. He also relied on the decisions in *Pitting bin Hj. Mohd. Ali* v. *Public Prosecutor*.[1] and *Toh Yew Sing & Ors* v. *Public Prosecutor*.[2]. In the former case B.T.H.Lee, J. held that counsel or an advocate cannot sign a petition of appeal. So to read the provision of subsection (iv) of section 307 of the Code is to read into it a great deal that is not there. In the latter case Tan Chiaw Thong, J. held that a petition of appeal must be signed by the appellant. A petition of appeal signed by anyone else including an advocate on behalf of the appellant is not in compliance with the requirements of subsection (iv) of section 307 of the Code.

We are of the view that Practice Note No.2 of 1960 was intended to be no more than a direction for administrative purposes. It cannot be exalted into a rule of law reflecting the true effect of the requirements of section 307 of the Code, and if it is wrong then the position should be recitified. We think it is wrong.

We are also of the view that the two cases relied upon by the learned judge were erroneous in as much as they held that it was mandatory for the appellant to sign the petition of appeal, and they should not be followed.

An appeal is instituted within the meaning of subsection (i) of section 307 of the Code when the appellant takes the initiative by lodging the notice of appeal in triplicate with the clerk of the Magistrate's Court which passed the judgment, sentence or order within the time prescribed. That, in our opinion, is a mandatory provision.

To lodge documents means to file or leave them with the appropriate official.

The notice of appeal shall contain an address at which any notices or documents connected with the appeal may be served upon the appellant or upon his advocate (subsection (ii)). In most cases the appellant is represented by an advocate and invariably the address of the firm of the advocate is contained in the notice of appeal. Where the appellant is not represented by an advocate, his address must be shown in the notice of appeal for the purpose of service. Next, a signed copy of the grounds of decision is served upon the appellant if he is not represented by an advocate, at his address mentioned in the notice of appeal by leaving the said copy at the said address, or by posting it by registered post addressed to him at the said address.

If he is represented by an advocate, the signed copy is served upon him by leaving it or posting it by registered post at his address mentioned in the notice of appeal (subsection (iii)).

The petition of appeal is then prepared as required by subsection (iv) of section 307 of the Code, which requires "the appellant" to lodge with the clerk of the Magistrate's Court the petition of appeal. In those cases above-mentioned the learned judges held that the appellant himself must sign the petition of appeal.

In coming to their decisions the learned judges were right in construing the words "the appellant" in the setting of the subsection, that is that the same word in the same section of a statute must be given the same meaning. But in our opinion this principle of construction is only one element in deciding the true intention of the section and it must not be carried too far lest we fail to see the wood for the trees. If the context excludes the application of this principle then it would be futile to apply it. Words take their colour from their context. Section 307(i) of the Code which relates to the procedure for appeal provides for a dissatisfied party to prefer an appeal to the High Court by lodging a notice of appeal and subsection (iv) stipulates the time for the appellant to lodge with the subordinate court a petition of appeal. Neither provision signifies the signatory to the notice or petition and does not provide for the appellant to do so 'personally' or 'in person' as some legislative enactments specifically prescribe. This therefore attracts the maxim *qui facit per alium facit per se* (he who does an act through another is deemed in law to do it himself). We are reinforced in our conclusion by the provisions of section 307 (vii) of the Code which enact that where the appellant is in prison he shall be deemed to have complied with the requirements of the section if he gives to the officer in charge of the prison either orally or in writing notice of appeal and the particulars required to be included in the petition of appeal within the prescribed time and on payment of the prescribed fee whereupon such officer shall forthwith forward the notice or petition or the purport thereof together with the appeal fee to the subordinate court. It is abundantly clear that in such a case the prison officer would be acting on behalf of the appellant in complying with the necessary statutory requirements for an appeal without the necessity for the appellant to sign the documents in question, and in the circumstances there is all the more reason to negate any justification for a constricted view in relation to an appellant fortunate enough not to be so confined.

We answer the question accordingly in the affirmative. The appeal is reinstated for hearing.

Order accordingly.

Solicitors: *R.R. Chelliah Bros.*

LAW HAP LIEN v. HENRY LO SIAK JIN & ANOR.

[O.C.J. (Chong Siew Fai J.) September 13, 1980]

[Kuching – Originating Motion No. K. 2 of 1980]

Land Law – Application for removal of caveat – Whether caveat should remain – Whether beneficiary has caveatable interest in land –

Chinese Customary Law – Administration of Estates Ordinance, S. 29.

This was an application for an order that a caveat entered by the applicant against 3 parcels of land forming part of the estate of his deceased father do remain in force until further order of the court or until after determination of certain questions relating to the winding up of the estate of the deceased under section 29 of the Administration of Estates Ordinance. The applicant disputed the entitlement of certain beneficiaries in the estate. On behalf of the applicant it was submitted that as he was a beneficiary of the estate whose beneficiaries had been ascertained, he had a caveatable interest in the 3 parcels of land. Accordingly, the *status quo* in the matter should be preserved pending the determination of certain questions relating to the winding up of the estate.

The respondents, on the other hand, contended that the applicant had no caveatable interest because the administration of the estate was still not completed in that there was still to be decided the question of the entitlement of the unmarried daughters of the deceased that is to say whether they were entitled to life interests in the deceased's estate and who should maintain them.

Held, allowing the application: there was no evidence to indicate that the deceased's estate had any outstanding debts or liabilities nor was there any evidence to show that the unmarried daughter of the deceased were entitled to life interests in the deceased's estate. Authorities tend to show that they are only entitled to be maintained by their brothers who inherit their father's estate. Since the residue of the estate has been ascertained, the question as to the number of the residuary beneficiaries only affects the value of their individual shares and does not affect the size or ascertainment of the residue of the estate. Accordingly, as the residue of the deceased estate had been ascertained, the applicant had a caveatable interest.